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U.S. Citizenship
and Immigration
Services

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MAR 04 2004

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary in the United States as a research assistant scientist. The director determined that the petitioner had not established that it had offered the beneficiary a qualifying, permanent position.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Regulations at 8 C.F.R. § 204.5(i)(3) state that a petition for an outstanding professor or researcher must be accompanied by:

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition . . . ;

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field . . . ; and

(iii) An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

Pursuant to regulations at 8 C.F.R. § 204.5(i)(2), "permanent," in reference to a research position, means either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

In a letter addressed to the director, submitted with the initial filing, [REDACTED] head of the petitioner's Department of Physics, state that the beneficiary's "employment is expected to continue." The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B) requires that evidence of a job offer must be in the form of a letter from a United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field. A letter to immigration authorities, describing the position, is not a letter offering the alien the position. The documentation submitted with the initial position does not include any actual job offer letter, nor any other documentation signed by both the beneficiary and an authorized official of the petitioning university, specifying the terms of employment and officially establishing the employer/employee relationship.

The director issued a request for evidence, asking the petitioner to submit further evidence to establish the qualifying nature of the job offer. In response, the petitioner has submitted a new letter from Dr. [REDACTED] specifying that the beneficiary has received "a full-time permanent position." The petitioner has also submitted a copy of the petitioner's job offer letter to the petitioner, dated June 5, 2001 and signed by Dr. [REDACTED]. The letter does not state whether or not the position is permanent; it indicates only that the "offer is contingent on . . . availability of funds." The job offer letter refers to the petitioner's position as "Research Scientist."

The petitioner has also submitted a copy of Form 19A/F, "Administrative/Professional Appointment." This form states the "period of appointment" as beginning May 19, 2001 and ending June 30, 2001, the end of the "initial contracting year." The Form 19A/F adds "[e]xtension of an administrative/professional appointment is governed by the provisions of Executive Memorandum No. B-55," which in turn is entitled "Terms and Conditions of Employment of Administrative and Professional Staff." The record, at the time, did not contain Executive Memorandum B-55.

The director denied the petition, noting the ending date and stating "[t]he original job offer is for a temporary, albeit renewable job and assurances from Dr. [REDACTED] . . . [are] not in the form of a job offer to the beneficiary." The director also stated "[a] renewable contract does not become permanent simply because it is renewed every year if the contract still requires renewal."

On appeal [REDACTED] the petitioner's assistant director of Human Resource Services, states:

[A]ll regular, benefits-eligible exempt staff must sign a contract upon appointment to the University. While the contract does include an end date, the process of renewal is automatic when the budget is taken forward at the beginning of the next fiscal year. After signing the initial contract, our regular employees never sign a contract again. . . .

[The beneficiary] is as much a permanent employee . . . as anyone else on regular staff.

Ms. [REDACTED] cites, and submits, the petitioner's Executive Memorandum B-55 to support the above claims. That memorandum, however, does not specify that "the process of renewal is automatic." Rather, it contains the following information:

5. EXISTING APPOINTMENTS

Administrative/professional appointments may be extended by: (a) action of the Board of Trustees upon approval of the annual operating budget . . . ; or (b) action by the Board of Trustees extending the budget period past 30 June; (c) approval of Payroll Change Form 10 by the President or designee.

6. NON-RENEWAL OF APPOINTMENT

If the University does not intend to continue the appointment of an administrative/professional staff member, the University shall normally give him/her written advance notice on Form 19E of such intention at least 30 calendar days prior to termination. The notice may be given by the President or designee.

* * *

8. TERMINATION DURING APPOINTMENT

- A. The University may terminate the employment of any administrative or professional staff member before the end of the term of appointment by giving him/her written advance notice on Form 19E of such intention at least 30 calendar days prior to termination.
- B. The University may terminate the employment of any administrative or professional staff member at any time before the end of term of appointment for reasons relating to the misconduct or inefficiency of the appointee.

Executive Memorandum B-55 contains no clause to guarantee that, barring misconduct or inefficiency, every active appointment covered by a Form 19A/P shall be renewed automatically as part of the budget process. There is also no requirement that a failure to renew an appointment must be for good cause. If renewal is discretionary, which it appears to be, then the position is not permanent. The assurance that the petitioner is unlikely to exercise its discretion by declining to renew the beneficiary's contract does not amount to a qualifying expectation of continued employment. Every June 30, the continuation of the beneficiary's appointment is contingent upon action by the Board of Trustees.

Ms. [REDACTED] assertion that the beneficiary "is as much a permanent employee . . . as anyone else on regular staff" is not a flat assertion that the beneficiary is, in fact, a permanent employee; it merely indicates that the petitioner employs the beneficiary under the same general terms as other members of the "regular staff."

[REDACTED] the petitioner's medical benefits supervisor, states that the beneficiary's "position is for an indefinite duration," although the petitioner has not shown that the assertion of the medical benefits supervisor should supersede first-hand contracts and policy documents in the record as discussed above.

The documentation supports the director's finding that the petitioner has appointed the beneficiary not to a permanent position, but to a succession of one-year appointments. Therefore, the petitioner has not established that it has offered the beneficiary a qualifying, permanent position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.